Volume 74

Volume 17

Nos. 66-4M, 66-5M

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellees,	)	Appeal from the
	)	Circuit Court of
vs.	)	Madison County.
	)	Hon. Joseph I.
RICHARD HENRY WOTCHKO,	)	Kelleher,
	)	Magistrate
Defendant-Appellant.	)	Presiding.
PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellees,	)	Appeal from the
	)	Circuit Court of
vs.	)	Madison County.
	)	Hon. Joseph I.
RICHARD LEE VESPER,	)	Kelleher,
	)	Magistrate
Defendant-Appellant.	)	Presiding.

George J. Moran, J.

This is a joint appeal from judgments of the Circuit Court of Madison County, Illinois, in two cases in which the court admitted both defendants to a term of probation for one year and committed them to the Illinois State Farm at Vandalia for a term of three months. From the minute sheets of the court, it appears that both defendants were brought before the court by the Sheriff of

Madison County, that they were advised of the charges against them by the court's reading of a notice to appear issued in the name of each defendant and by the mention of the name and identity of the complaining witness, that the court advised them of their rights and guarantees, that both defendants, having entered written pleas of guilty, were found guilty of resisting or obstructing a police officer.

The issue in this appeal is whether the conviction of the defendants can stand when no formal charges appear to have been filed against them.

The Criminal Code of Illinois provides that a prosecution may be commenced by a complaint, an information, or an indictment. Ill. Rev. Stat. Ch. 38, Sec. 111-1. No complaint, information, or indictment appears to have been filed in this case. Nor can the notice to appear function as a charge, since our Supreme Court has very recently stated that the Code of Criminal Procedure, enacted in 1963, "provides for the use of a summons, or a notice to appear as 'procedures for getting persons into court without the necessity and inconvenience of an immediate arrest'... (and) continues the statutory requirement for a sworn complaint." People v. Harding, 216 NE2d 147 at 151-52. (Emphasis supplied.)

For the foregoing reasons the judgments of the Circuit Court of Madison County are reversed.

Judgments reversed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY.

August 11, 1966

7 - 1A 2 | 95 (1)

General No. 10735 Agenda No. 66-43

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

People of the State of Illinois, Plaintiff-Defendant in Error vs. Elmer L. Smith, Defendant-Plaintiff in Error	Error to Circuit Court Sangamon County

Moran, J.

The defendant, Elmer Smith, was indicted for attempted burglary. He waived trial by jury and was found guilty in a trial before the Court. The State subsequently filed a petition, reciting other convictions and asking the court to impose sentence under the provisions of the Illinois Habitual Criminal Act. The court thereupon imposed a sentence of a term of not less than 10 years nor more than 20 years in a penitentiary. The defendant appeals.

The defendant argues that no credible evidence was introduced to prove his guilt beyond all reasonable doubt and that prejudicial error was committed by the State in introducing evidence of his prior convictions at the trial before he was found guilty.

Wilbur Baker testified that he was the manager of the Illinois Garage Supply Company and that on March 14, 1963 he locked all doors between 5:00 and 5:30 P.M. He had not observed any pry marks on the front door at that time. Upon reporting to work at 7:30 A.M. on March 15, 1963, he noticed that there were marks on the wood where the paint had been knocked off.

William Ascher, a police officer for the City of Springfield, testified that he and his partner, Roger Leigh, passed the building at 11:00 P.M. on March 14, observed the door clearly, and saw that there were no marks on it. At about 12:15 A.M., he noticed the defendant in the doorway of the building, bent over slightly with his hands and arms in front of him. The defendant looked over his right shoulder and immediately turned and walked from the doorway, holding his hands in front of him. When he arrived at a vacant lot north of the building, his right hand went out in a throwing motion. At this point, he was told to stop and was apprehended. He first stated that he didn't have a name and didn't live anywhere. Officer Ascher then testified that he examined the door and found a mark on part of the wood next to the lock and one wooden chip lying on the cement at the door entrance. He then entered the vacant lot north of the

building and found a crowbar. Upon questioning, the defendant said he didn't know anything about the crowbar. The claw end of the crowbar was painted red. The officer then testified that the defendant was wearing gloves when he was stopped and identified a pair of white gloves as those taken from the defendant. The palm of the gloves was dirty with a tint of red as if rubbed against something red. In the squad car, the defendant gave his name and said that he had just arrived from Chicago.

Roger Leigh testified to essentially the same facts, except that the defendant had stated that he went inside the doorway to urinate, but that there was no evidence of his having done so.

The defendant, Elmer Smith, was called as a witness by his counsel. He admitted on direct examination that he had been convicted previously of burglary and robbery. He stated that, on the night in question, he was walking to his brother's home and that he was near the Illinois Garage Supply Company when he saw a fellow running around the building from the doorway. He stopped to look at the door because he was curious. He admitted that he had told the police officers that he had urinated there. He said that there was nothing unusual when he looked at the door and that he turned and left. The police officer then drove up, called him, and searched him. He stated that he had put

the gloves on because it was cold.

In rebuttal, Officer Ascher testified that, at the police station, the defendant stated that he had had quite a bit to drink and didn't exactly know what was going on. The defendant also stated that he had gone along the side of the building to urinate. Later, he stated that he had stopped in the doorway to urinate, but that he had not attempted to break in. The officer also testified that when he brought the crowbar to the car in which the defendant was seated, the defendant stated that the officer wouldn't find any of his prints on it because he had worn gloves.

The evidence that the defendant attempted a burglary is circumstantial, but in our opinion it was sufficient to justify the trial judge in finding that his guilt was proven beyond a reasonable doubt. The inconsistent and incriminating statements by the defendant, the presence of the defendant at the doorway and his subsequent actions, the presence of the marks on the door between 11:00 P.M. and 12:15 A.M., and the gloves which the defendant was wearing are hardly consistent with any other rational explanation. While it is the law in Illinois that a conviction based on circumstantial evidence can stand only if the facts proved establish guilt so as to exclude every

reasonable hypothesis of innocence, The People v. Dougard, 16 Ill. 2d 603, no such hypothesis exists in this case.

In addition, the defendant cannot now claim that prejudicial error was committed in the admission of the prior convictions of the defendant; for the defendant's own counsel elicited the information in his direct examination. In People v. Nastasio, 30 Ill. 2d 51, our Supreme Court stated that "(t)he defense cannot therefore claim error or prejudice once the defendant has opened the door on direct examination."

For the foregoing reasons, the judgment of the Circuit Court of Sangamon County is affirmed.

JUDGMENT AFFIRMED

Goldenhersh, P.J. and Eberspacher, J., concur.

General No. 10769 Agenda No. 66-64

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

Ronald W. Sadewater, Vivian M. Sadewater, George R. Dinsmore, V.K. Collins, Robert Gold, Barnard Hewitt, Donald G. Dillabaugh, Vivian Terrill, Enid Schnauber, Mildred Irene Russell, Hazel M. Huber, Roy M. Ekstam, Jack B. Troxell, Mary R. Garza, Cecil B. Davis, Edythe Davis, George N. Foster and D. Bruce Smith, Plaintiffs-Appellees vs. City of Champaign, Illinois, a municipal corporation, and L.E. Kirby, as Superintendent of Building Inspection of the City of Champaign, Illinois, and Frank K. Robeson, Defendants-Appellants	Interlocutory Appeal from Circuit Court Champaign County

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Smith, J.

The single issue here is the propriety of a temporary injunction issued after notice, hearing and bond restraining the defendants from the enforcement of an amendatory zoning ordinance which reclassified the subject property from R-3, Residential, to B-2, Community Shopping. Defendant Robeson intervened as the purchaser of some of the rezoned properties.

The case is submitted to us, as it was in the trial court, on the question of the sufficiency of the complaint - verified by way of amendment - to support the temporary injunction.

Looking first at basic principles, we find that trial courts are vested with a large discretion in the issuance of a temporary injunction to maintain the status quo and its action will not be disturbed by a reviewing court unless that discretion has been abused. City of Aurora v. Warner Bros. Pictures Dist. Corp., 16 Ill. App. 2d 273, 147 N.E. 2d 694. In this same case, it is pointed out that the primary purpose of a temporary injunction is to preserve the status quo and that the showing on the pleadings is less than that required to obtain a final and permanent injunction. It is thusly stated in Western Auto Supply Company v. Chalcraft, 16 Ill. App. 2d 461 page 464, 148 N.E. 2d 592 page 594:

> "...the trial court is not required to be minutely critical of the complaint, and this court will not readily interfere with the discretion allowed in such matters. Friedman v. Peckler, 255 Ill. App. 199. It is not required that plaintiff make out a case that is certain to prevail on final hearing, it is enough if there is shown a fair question as to the existence of the rights claimed, so that the court is satisfied their present state should be preserved until final hearing and disposition. Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 574, 21 N.E. 2d 723."

With these principles in mind we examine the complaint here. It is but ritualistic repetition to say that the complaint must state a cause of action. We do not understand this to mean that the complaint must be immaculate but only that it state a cause of action, albeit perhaps not with the precision that would be desired. We think the criticisms leveled at this complaint are, at this point, without merit. It is first asserted that you can't tell where plaintiffs' property is located and the complaint is within the disabilities set out in Winston v. Zoning Board of Appeals, 407 Ill. 588, 95 N.E. 2d 864. The complaint in this regard states:

> "The property of Plaintiffs and of other property owners in the area contiguous and adjacent to the property rezoned is residential in nature, is not commercial, and this area which is residential extends from Mattis Avenue on the West to Prospect on the East and the I.C. Railroad tracks on the North and Springfield Avenue on the South."

In our judgment this states the location of plaintiffs' property with sufficient accuracy.

It is claimed that the pleading of damages is pure conclusion and thus not admitted on motion to dismiss when the damage is stated as follows:

> "The property values of Plaintiffs and of other property owners in the area in question will be irreparably harmed and damaged by the reclassification ordinance and such ordinance will promote the depreciation in the property values of Plaintiffs and take their property without due process of law."

In our judgment this sufficiently alleges that the property will be adversely affected by the rezoning and that damage will result even though the precise extent thereof is not set forth with precision. The fact of damage is alleged; the extent thereof is evidence.

The complaint alleges that the rezoning was for the purpose of allowing the creation of gas stations and that such property "is not suitable for such business, it being too small an area" and if so used would create a traffic hazard at "said intersection". This is attacked as a pleading of mere conclusions without specifying the exact size of the area nor the size required for a filling station. It is also urged that the allegation of an "unreasonable congestion" and an "unreasonable danger" are the pleading of mere conclusions. It strikes us that defendants here seek the pleading of evidence and that the allegations are sufficient to present an issue of fact.

The complaint further states that the purported ordinance was passed by a vote of 4-3 by the city council and for it to be valid the vote should have been by a 2/3rd majority inasmuch as there was a petition on file signed by more than 20% of the property owners adjoining the property rezoned. We assume these allegations seek to invoke the provisions of Ill. Rev. Stat. 1965, ch. 24, § 11-13-14. The allegations of this paragraph are meager to say the least. The statute is not cited nor is it even stated that the petition objects to

the rezoning. Whatever may be the future of this allegation and its sufficiency, it is not essential to the validity of the temporary injunction. It is only an additional factor going to the propriety of the issuance of the injunction. Strike it in its entirety and sufficient allegations exist for the issuance of the injunction.

We cannot say from this record that the trial court abused his discretion in maintaining the status quo. We think it was properly exercised and that the case should be determined on its merits. We have carefully reviewed this record and conclude that the complaint is sufficient to support the judgment. The judgment is accordingly affirmed.

Affirmed.

Trapp, P.J. and Craven, J. concur.

No. 65 - 151

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES O. CAVITT and CHARLES CAVITT, a Minor, by his Next Friend, Charles O. Cavitt,	)	
Plaintiffs-Appellants,	)	
v.	)	Appeal from Circuit Court Winnebago County, Illinois
TERRENCE F. FAULKNER,	)	
Defendant-Appellee.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This case arises from an automobile accident that occurred on February 15, 1964, at approximately 6:45 P. M. on Riverside Boulevard, Winnebago County, Illinois. The plaintiff, Charles O. Cavitt, in his own right and as next friend for his minor son, appeals from a judgment of the Circuit Court of Winnebago County entered on a jury verdict in favor of the defendant, Terrence F. Faulkner.

Charles O. Cavitt left his home shortly before the accident in his 1963 Rambler automobile. His teen-age son, Charles, sat beside him on the front seat and two school mates of the son were passengers in the back seat. Mr. Cavitt was driving the boys to a basketball game at the local high school that was to begin at 7:00 P. M. For this purpose, Mr. Cavitt proceeded in a southwesterly direction on Riverside Boulevard on the way to the high school. A recent snowfall covered the road and

obliterated both the center line and the sides of the road. Conscious of the hazardous driving conditions and of his young passengers, Cavitt drove no more than 25 miles an hour.

Cavitt first observed Faulkner's automobile approaching from the opposite direction on Riverside Boulevard approximately a quarter of a mile away from the ultimate point of collision. He was unable to determine the speed of Faulkner's vehicle. Cavitt testified that then ". . . all at once, why, this car was coming towards me, and he (indicating) like that, he went sideways and came right into us." At the time of the impact, Cavitt stated that his Rambler was in the right lane of the Boulevard. The testimony of Cavitt's son and of one of the other passengers corroborated the version of the accident related by him.

Norvall James, a deputy sheriff for Winnebago County, testified for the plaintiffs. James arrived at the accident scene at approximately 7:02 P. M. All of the occupants of both cars were on their way to the hospital by that time, but according to James, neither automobile had been moved. Cavitt's car was halfway on the right shoulder of the road and debris from the accident was strewn near it on the right side of the highway. Faulkner's 1956 Chevrolet, "cross-ways" on the road, faced in an easterly direction. From his examination of the scene, James testified that he was able to "determine" that Cavitt had pulled to the right immediately prior to the impact in an unsuccessful effort to avoid a collision with the then sidewise movement of Faulkner's car. However, Cavitt himself was unable to recall that he had veered to the right to avoid the crash.

Faulkner testified that he saw the lights of Cavitt's car as he rounded a curve some considerabledistance from the place of collision. Also aware of the dangerous driving conditions, Faulkner pulled his automobile to the right to permit Cavitt a maximum of room as the cars passed and reduced his speed to 10 to 15 miles an hour. However, the wheels of the Faulkner car apparently left the pavement momentarily and he made an effort to straighten them which apparently caused his car to veer to the left for approximately two and one-half feet. Faulkner regained control of his car and proceeded in his own driving lane when he again saw Cavitt's vehicle "probably twenty to forty feet away". At the time of impact, Faulkner stated he was on his side of the road and that Cavitt drove into him.

All parties agreed that driving conditions were poor; that the surface of the road was covered with several inches of snow; that it was impossible to determine either the center line or sides of the highway; and that it was slippery. Plaintiffs and their witnesses stated that the snowfall itself was light and that visibility, at the time of the accident, was fairly good. On the other hand, the defendant and his witnesses describe the snowfall as heavy and visibility poor.

Faulkner states that after the collision, "my car was on my side of the road straddling the shoulder with the front wheels over on the shoulder". Florence Weber, a witness for the defendant, testified that she was in a car driven by her husband immediately behind Faulkner and that Faulkner's car came to rest on the right hand side of the road. Her husband was unable to accurately state the location of the Faulkner car on the road after the impact because of the cover of snow. Beverly Dockery, also a defense witness,

was behind the Cavitt car. She stated that immediately prior to the collision both cars veered to their right and that after the impact Faulkner's car was on the road, faced east, and the debris from the accident "was about between them".

Photographic exhibits introduced in evidence show that Cavitt's car was struck with great force on the left front and that the entire front end of Faulkner's vehicle was badly damaged.

Plaintiffs urge that the factual situation which we have briefly described clearly establishes that the verdict of the jury was against the manifest weight of the evidence and should be set aside.

Under certain circumstances, a court will, and must, set aside the verdict of a jury as to a question of fact when that verdict is against the manifest weight of the evidence. Turner v. Seyfert, 44 Ill. App. 2d 281, 286. Lowe v. Gray, 39 Ill. App. 2d 345, 351. A verdict that is against the manifest weight of the evidence is one that has been variously defined as palpably erroneous, wholly unwarranted, or one from which the opposite conclusion is clearly evident. Vasic v. Chicago Transit Authority, 33 Ill. App. 2d 11, 11 e.

A verdict will not be set aside on the determination that an opposite conclusion would have been more reasonable. Buer v. Hamilton, 48 Ill. App. 2d 171, 174, 175. Post trial motions for judgment notwithstanding the verdict and a new trial were heard and denied by the trial court. We must, therefore, also consider the fact that the trial court heard the evidence, observed the witnesses, considered the motions, and then refused to set aside the jury verdict. Mokrzycki v. Olson Rug Co.,

28 Ill. App. 2d 117, 124; Green v. Smith, 59 Ill. App. 2d 279, 284.

The testimony in regard to the facts of this accident is, in many important respects, in complete conflict. The position of both automobiles after the impact is also disputed. Under the circumstances, we will not substitute our judgment for that of the jury even though a different conclusion by them might have appeared more reasonable. The jury, and the trial judge, were in a position to consider the conflict in the testimony, observe the witnesses, determine their credibility, and arrive at appropriate factual determinations. We cannot say that those determinations were against the manifest weight of the evidence.

The plaintiffs also contend that their case was prejudiced in the eyes of the jury during the cross-examination of the deputy sheriff, James, by counsel for the defense. The record discloses that the cross-examination commenced as follows:

> "Q. Did you arrest Mr. Faulkner for any traffic violation?
> Mr. Reese: I object. He knows that's an improper question.
> Mr. Traum: It would be objectionable from their standpoint.
> The Court: I don't think it's material, is it? Don't this case stand based on what the facts are here, not what the officer might have done?
> Mr. Traum: It may be, but I would like to inquire, if I may.
> The Court: Well, if he was convicted or something like that, it would be all right, but I don't think it is material here."

The question was improper, of course, and the objection properly sustained by the trial court although apparently for the wrong reason. We are not impressed by the contention of the defendant that the question was intended to impeach the witness, although if that were true the information might have been admissible. Jacobson v. National Dairy Products Corp., 32 Ill. App. 2d 37, 42. However, we are also not impressed by the argument of the plaintiffs that this exchange prejudiced them. The objection was made in time, sustained, and no answer given. The gratuitous

remark of the trial judge was scarcely sufficient to inform the jury that no arrest was made. In any event, that information had previously been disclosed by the plaintiffs' counsel in his direct examination of the defendant, Faulkner, under Section 60 of the Civil Practice Act.

Finally, plaintiffs urge that the court committed fatal error in giving Defendant's Instruction No. 11, to-wit:

> "Jury is instructed that they are not bound to believe anything to be a fact simply because a witness has stated it to be so provided that you believe the witness is mistaken or has testified falsely."

This type of instruction was criticized by the Illinois Supreme Court Committee on Jury Instructions (I P I Instruction No. 2.02) and the following comment made:

> "It is recommended that no instruction of this type be given. Determination of credibility of witnesses is solely within the province of the jury and it is superfluous to inform them that certain witnesses need not be believed. The standards for assessing credibility of witnesses are adequately set forth in Instruction 2.01."

Similar instructions had been criticized in prior Illinois decisions but were not considered reversible error. Aldridge v. Morris, 337 Ill. App. 369, 375; Devaney v. Otis Elevator Co., 251 Ill. 28, 39. We agree that the instruction was superfluous and unnecessary in light of the fact that the court gave I P I Instruction No. 2.01 but cannot conclude that the giving of this instruction under the facts of this case amounted to reversible error.

For the reasons given, the judgment of the Circuit Court of Winnebago County will be affirmed.

JUDGMENT AFFIRMED.

MORAN, P. J. and DAVIS, J. concur.

No. 65-100

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MYRTLE TIMMERMAN, Plaintiff-Appellant, -vs- IVAN WILSON, Defendant-Appellee, and MARVIN D. WILSON and CARL PANKEY, Defendants.	)	Appeal from the Circuit Court of Wayne County, Illinois. Honorable Charles E. Jones, Judge Presiding

George J. Moran, J.

Plaintiff, Myrtle Timmerman, appeals from an adverse judgment of the Circuit Court of Wayne County in an equity case.

This was an action brought in equity seeking to obtain partition of certain real estate located in Fairfield, Illinois, held of record by plaintiff and by defendant, Ivan Wilson. Plaintiff's amended petition further sought to charge the undivided one-half interest held by defendant with a resulting trust in plaintiff's favor, or alternatively to impose upon the undivided one-half interest a lien for the amount of plaintiff's unsatisfied judgment against said defendant's grantor, Marvin Wilson, formerly plaintiff's husband.

Plaintiff alleged that when she was divorced from Marvin Wilson in October, 1958, at St. Louis, Missouri, she was awarded alimony amounting to $20.00 per week and attorney's fees of $150.00; that no part of said judgment has ever been satisfied; that shortly after plaintiff filed her petition to register said judgment as a foreign judgment in Wayne County, Illinois, the said Marvin Wilson, who with plaintiff was the record owner of the aforesaid real estate located in Fairfield, conveyed his undivided one-half interest in said property to his sister, Ivan Wilson; that said conveyance was without consideration and was made and placed on record by defendants to hinder, delay and defraud plaintiff as a judgment creditor of Marvin

Wilson; that plaintiff had furnished the full consideration for said real estate at the time it was purchased, and that Marvin Wilson, who was then plaintiff's husband, had furnished no consideration; that plaintiff had intended no gift to defendant in placing the property in joint names with her husband; that defendant Carl Pankey presently occupies the premises as a tenant; and that defendants are and have been wrongfully collecting and withholding from plaintiff one-half of the rentals from said premises.

Defendants Marvin D. Wilson and Carl Pankey failed to answer and were adjudged in default. Defendant Ivan Wilson denied in her answer all material allegations that would render the conveyance invalid or fraudulent, and pleaded affirmatively that plaintiff was estopped to deny defendant's interest in the property because over a period of time she had permitted the rents to be divided equally and the taxes, insurance, and repairs to be paid equally by the parties.

After hearing the evidence, the trial court entered its decree finding that plaintiff and defendant, Ivan Wilson, were each entitled to an undivided one-half interest in the premises, that plaintiff had no lien against defendant's interest, that plaintiff was entitled to reasonable attorney's fees, and that a division of the property should be made.

When the party who prevails in the trial court does not appear or file a brief, this court is authorized to reverse and remand the cause without further consideration or discussion. C.I.T. Corp. v. Blackwell, 281 Ill App 504. Since defendant, Ivan Wilson, did not see fit to file a brief to aid the court in the decision of the appeal, we invoke the above stated rule and reverse the decree in part.

We hold that the plaintiff, Myrtle Timmerman, does have a valid lien on the interest of defendant, Ivan Wilson, in and to the following property, described as a six-room dwelling, being No. 208 Lakeview Drive, situated on Lot Number 24 in Lakeview Subdivision to the City of Fairfield, Wayne County, Illinois, to the extent of the alimony and attorney's fees due to her from the defendant, Marvin Wilson, under the Missouri Divorce decree. That portion of the trial court's decree which holds that "the plaintiff, Myrtle Timmerman, does not have a valid lien on

the undivided one-half interest of defendant, Ivan Wilson, and said interest of the defendant is free and clear of plaintiff's claim" is reversed.

The trial court's judgment is affirmed in part and reversed in part. This case is remanded to the Circuit Court of Wayne County for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part,
and remanded for further proceedings.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY.

filed August 25 1967

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General No. 10717 Agenda No. 66-28

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

People of the State of Illinois, Plaintiff-Appellee vs. William Edward Henry, Defendant-Appellant	Appeal from Circuit Court Macon County

Smith, J.

Defendant appeals from a judgment sentencing him to 5-14 years for an attempt to commit burglary. Motion for new trial was denied. The jury deliberated only about 15 minutes and it is here urged that this "instant" verdict resulted from the giving of People's Instruction No. 12 which it is urged was prejudicial because it assumes the defendant committed the crime.

The instruction so given reads as follows:

> "An accomplice witness is one who testifies that he was involved in the commission of a crime with the defendant. The testimony of an accomplice witness is subject to suspicion, and should be acted upon with caution. It should be carefully examined in light of the other evidence in the case."

On this same subject matter, the court refused defendant's tendered instruction reading as follows:

> "The jury are instructed that the witness, John R. Wheeler, is what is known in law as an accomplice, and that while it is a rule of law that a person accused of crime may be convicted upon the uncorroborated testimony of an accomplice, still the jury should always act upon such testimony with great care and caution in the light of all other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after careful examination of such testimony, they are satisfied, beyond a reasonable doubt, of the truth of such testimony and that they can safely rely on it."

The giving of the one and the refusal of the other is assigned as error. Prosecution's No. 12 was a definition of an accomplice witness. There is little doubt that John Wheeler is just that. The instruction correctly defines such a witness. The instruction does not assume the defendant's guilt. It merely asserts that an accomplice witness is one who testified that he was involved in a crime with the defendant. The court is defining accomplice witness and is not asserting that the testimony of the witness is necessarily true or worthy of belief, but is cautioning the jury to act upon such testimony with caution. The instruction so given was proper. While the defendant's instruction is more elaborate, it is repetitious and in itself has the disability of stating categorically that John R. Wheeler is an accomplice - an accomplice of whom? Obviously the defendant. We see no impropriety in the court's ruling on each of these two instructions.

This record does indicate that it was a "quick" verdict. That this is so does not imply that it is an improper verdict. Without detailing the evidence, it is apparent that defendant Henry's explanation of his conduct on the evening in question was not believed by the jury. Particularly is this true when meshed with the testimony of Wheeler, albeit Wheeler was a somewhat reluctant and evasive witness and crawled behind his drinking to justify his uncertainty. Apparently the jury was quick to see through all of this and there was little to debate, discuss or consider.

There is nothing in this record to justify a new trial and the judgment must be and it is affirmed.

Affirmed.

Trapp, P.J. and Craven, J. concur.

Abstract

NO. 65-159

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RAYMOND T. WYER, Plaintiff-Appellee, vs. McKEOWN-PHALIN CHEVROLET, INC., a corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of DuPage County.

MR. PRESIDING JUSTICE MORAN delivered the opinion of the Court:

There is but one question raised by this appeal. Was the evidence introduced at the trial, before a jury, sufficient to support the verdict of $8500.00? The defendant believes that it was excessive, and therefore, the trial court erred by refusing to enter a remittitur, or in the alternative, by refusing to grant a new trial. No other error is urged.

The plaintiff, while driving his automobile westward on Roosevelt Road in Glen Ellyn, Illinois, collided with the tractor of a trailer truck that was in the process of negotiating a left turn into a driveway. The trailer was not attached to the truck at the time of the accident. As a result of the

impact, the plaintiff suffered injuries to the right side of his body, which included his right foot, knee, fingers, chest, neck and shoulder.

During the course of trial, the plaintiff testified that all of his injuries, except his right knee, healed within a maximum of six months; that he still continues, some three and one-half years after the incident, to wear a knee brace; that he still suffers pain when he does any excessive walking or exercise; that his knee was treated on some thirty occasions over a period of seven months; and that he incurred special damages in the sum of $552.00.

Dr. Allan Hirschtick, an orthopedic surgeon, testified that he first examined the plaintiff over a year after the accident and again the morning of his testimony. His findings on both occasions were essentially the same. He testified that the front of the right thigh, known as the quadriceps muscle, was smaller than the opposite thigh and weaker; that the outer right kneecap was tender with a definite roughening of the under-surface; that in movement of the right knee he found crepitus, or a crackling. His diagnosis was chondromalacia, or the softening of the cartilage, which would progressively become more degenerative in the years ahead, with the result of a slowly increasing impairment of function. It was his opinion that such a condition could cause pain and be a cause for disability. Further, that the wasting of the quadriceps muscle in the right thigh is permanent as well as the roughening condition in the right knee.

This testimony stood uncontradicted. The plaintiff had been examined by the defendant's doctor, but no medical testimony was introduced into the defense of the case.

Defendant's only basis for his alleged error of excessiveness is that the jury was prejudiced because the defendant was a corporate "target." It reasons that the ratio between the amount of special damages and the amount of the verdict is so high, 15-1, that the jury was necessarily prejudiced. While the ratio of special damages to the amount of the verdict may be one factor in determining the possibility of passion and prejudice on the part of a jury award, still it cannot be said to be the sole consideration. In the case of O' Keefe v Lithocolor Press, Inc., 49 Ill. App. 2d 123 (1964), it was argued that the total expense of $248.28, proved by the plaintiff, could not warrant a verdict of $15,000.00. However, the Court stated at page 136:

> "The test is not the amount of out-of-pocket expenses."

In Lau v West Towns Bus Co., 16 Ill. 2d 442 (1959), the Supreme Court set up one test concerning the query before us, where at page 453, it was held:

> "Each verdict for a personal injury must be examined in the light of the particular injury involved, with humble deference to the discretion of the jury in making its determination and to the ruling of the trial judge on the post-trial motions."

In that case the jury award was $75,000.00 based upon special damages incurred in the amount of $1500.00.

We have carefully examined the appeal before us in the instant case and find nothing to indicate or substantiate the defendant's claim that the jury was prejudiced because of a corporate defendant.

Consequently, the judgment is affirmed

JUDGMENT AFFIRMED.

Davis, and Abrahamson, JJ, concur.

Filed 9-7-66 71 I.A.2 297

NO. 66-27

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JOHN VASESKA, Defendant-Appellant.	)	Appeal from the Circuit Court of Monroe County, Illinois.

Per curiam:

Defendant, John Vaseska, appeals from the judgment of the Circuit Court of Monroe County finding him guilty of the offense of Battery (Ch. 38, sec. 12-3, Ill. Rev. Stat. 1965). The court imposed a sentence of 20 days in the Monroe County Jail, fined defendant $100.00, and assessed costs in the amount of $55.30.

The complaining witnesses are members of the Waterloo Volunteer Fire Department. On October 1, 1965, they responded to a call on the Pole Station Road in Monroe County. On arrival at the scene they discovered that a property owner was intentionally burning an old chicken house and their services were not needed.

Defendant drove to the scene of the fire. Whether he went as an on-looker, or to offer his assistance, is not clear from the record. He parked his car near the scene, and according to his testimony, was in the car, waiting for his wife to enter through the right-hand door, when he was accosted by one of the complaining witnesses. According to the testimony of the complainants, defendant's car had blocked the roadway over which they were going to remove the fire fighting equipment and defendant had ignored several requests to move his automobile. Whether they spoke in a gentlemanly manner, or whether profanity was used, and what transpired thereafter

is strenuously disputed. The complainants deny the use of profanity and state that defendant, admittedly smaller than any of them, grabbed one of them by the throat and threatened to strike him, grabbed another by a shop coat he was wearing and shook him, and pushed a third man who was then engaged in copying the numbers on the license plate on defendant's car. Defendant and two other witnesses stated that there was sufficient room to drive the trucks past the car. One witness, a member of the Volunteer Fire Department testified that he saw no physical contact between defendant and any of the complainants.

We have carefully reviewed the record and although this court would not have made the same findings as did the trial court, we will not substitute our judgment for that of the trial judge, sitting without a jury, People v. Bolger, 359 Ill. 58; People v. Sudduth, 14 Ill. 2d 605, and the judgment insofar as it adjudges defendant guilty of battery will be affirmed.

After the court announced its finding of guilty, a discussion ensued between court and counsel as to the penalty. The State's Attorney stated: "Well its a question of sentencing, your Honor and I submit to you once again that this case is not a trivial matter and that this was just an unnecessary interference with the discharge of their duties and I submit that it should not be regarded lightly and that a punishment should be imposed here which is adequate to inform the defendant that this cannot be tolerated and which is adequate to deter other people from interfereing (sic) with our firemen when they respond to an emergency call and I submit that the defendant should be placed in confinement for the offense of which he has been convicted of."

After sentence was imposed, defense counsel moved for a stay

of sentence in order that an appeal could be taken. A lengthy colloquy followed, part of which is hereafter quoted:

"By the Court: I see no reason, Mr. Dixon for a stay.

*****

" Mr. Crowder: Well it's the position of the State that we oppose any leave for the defendant to be out on bond during the pendency of an appeal.

*****

" By the Court: Well I don't see any reason for it, Mr. Dixon. I don't see any reason for it in this case at all.

*****

" Mr. Crowder: Well it's been the State's experience in the past on these cases, Judge that by permitting the defendant to remain out on bond it merely complicates the thing and creates all sorts of anxiety and pressures which people ought not be exposed to.

*****

" By the Court: But if the Court can't enforce this kind of judgment we might as well not try to enforce anything. If I sentenced him six months, I think you might have something, but as Mr. Crowder said, we have three counts here and its only a twenty day sentence. I'll say this, if the Appellate Court is going to reverse this I'll stop passing jail sentences and I'll let them do it. If you think your man should actually have an appeal here and have the bond continued, I think under the law you probably have the right to do it, but I think this matter of staying it is discretionary with the Court.

" Mr. Dixon: Well then I would ask the Court to exercise its discretion so that we can test whether its a fair penalty.

Mr. Crowder: Well once again, your Honor, on behalf of the People we oppose as a general proposition the defendant being out on bail after there has been a pronouncement of confinement of sentence as it only creates volume of difficulty.

By the Court: We did that about two months ago and we had all kind of troubles and I am not going to do that again. If you can find some other legal remedy to stop it, why it's all right with me, but I am not going to do it. As Mr. Crowder said this was about two months ago on the same kind of situation and after thirty days there was no appeal taken and during the thirty days we were harassed from one end to the other about what we were going to do about it, if we were going to change our minds and everything else and I am not going to go through that again. If we don't pass these judgments, there's no point in having court the way I look at it. If you find something in the law that says you can have something else, I'd certainly be willing to go along with it, Mr. Dixon.

Mr. Dixon: Well then is it your order that he be committed to the jail at once, your Honor?

By the Court: That's right.

Mr. Dixon: Well then I think you have effectively prevented him from exerciseing (sic) his rights to appeal.

By the Court: I don't think so.

Mr. Dixon: Well what good is an appeal when a man is in jail doing his twenty days.

By the Court: Well look in the statute and see if you can find something."

Defendant filed a motion in this court and an order was entered staying the sentence pending the decision of the appeal.

The Code of Criminal Procedure of 1963 and the Supreme Court Rules clearly authorize the release of a defendant on bail, after conviction and pending appeal. (Ch. 38, sec. 110-10, Ill. Rev. Stat. 1965, Supreme Court Rule 27). We have searched the record for some evidence which would warrant denial of bail in this case where, admittedly, no blows were struck and no one suffered physical injury. True, the granting of a stay pending appeal is discretionary, and in the opinion of this court, the refusal to admit this defendant to bail in this case, for the reasons stated in the record, was a clear abuse of discretion.

The record in this case does not warrant the imposition of a jail sentence. We invoke the power conferred upon this court (Ch. 38, sec. 121-9(b)(4), Ill. Rev. Stat. 1965) and modify and reduce the sentence to provide that defendant be ordered to pay a fine in the amount of $100.00 and the costs incurred in the trial court. The judgment, as modified, is affirmed and the cause is remanded to the Circuit Court of Monroe County for further proceedings consistent with this opinion.

Judgment modified and affirmed
and cause remanded with
directions.

PUBLISH ABSTRACT ONLY

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10758 Agenda No. 66-20

People of the State of Illinois,
Plaintiff-Appellee
vs.
Kenneth A. Green,
Defendant-Appellant

Appeal from
Circuit Court
Coles County

CRAVEN, J.:

The defendant was found guilty by a jury on four counts of forgery and three counts of theft. The court denied probation and entered a sentence of three to ten years on all counts. The defendant was attorney for Thomas Wickham, representing him in a claim for personal injury. Both the forgery and theft counts relate to the defendant's settlement of his client's claim, execution of certain instruments and retention of the entire proceeds.

The defendant contends that under Counts I, II, III, and IV, alleging forgery, there was insufficient evidence to prove an intent to defraud because the defendant had implied

authority to settle the case as he saw fit and that he later tried to negotiate a settlement with his former client.

The defendant further contends that Counts V, VI and VII pertain to the same act of theft and thereby subject him to double jeopardy; that Counts V, VI and VII fail to state an offense; that under Counts V, VI and VII the evidence fails to show an intent to permanently deprive the owner of his property. The defendant also contends that erroneous instructions were given to the jury, and finally argues that probation should have been granted and that the sentence was excessive.

The personal injury action was first filed in Cumberland County and later dismissed and refiled in the Eastern District of the United States District Court at Danville, Illinois. Thereafter Mr. and Mrs. Wickham moved to Florida and on July 31, 1963, the defendant settled the claim for $15,000.00. He failed to advise the Wickhams of the settlement and on September 26, 1963, wrote a letter to Mr. Wickham stating that the case had not been settled and would probably go to trial in December of 1963.

A release and stipulation were executed on August 12, 1963. The Wickhams' names were signed in their absence. On the same date the defendant received a draft for $15,000.00 payable to "Thomas Wickham and Sophronia Wickham, his wife, . . . and Kenneth A. Green, their attorney." The Wickhams did not

endorse the draft. However, their names were affixed thereto and testimony of the handwriting expert established that the signatures on the release and the draft were written by the same person. The defendant thereafter deposited the entire proceeds in his personal account, although he had an escrow account at the same bank.

The defendant made several phone calls to the Wickhams in Florida concerning the suit. Thereafter the Wickhams returned to Illinois, retained other attorneys, and made demand upon the defendant for the proceeds. No part of the settlement proceeds has been paid by the defendant to the Wickhams. The defendant argues he stands ready to surrender the proceeds less his contingent basis attorney's fee.

The defendant was indicted for theft and forgery which arose out of the same course of conduct. The defendant alleges that Counts V, VI and VII violate his right against double jeopardy under the state and federal constitutions. Counts V, VI and VII relate to the same alleged theft of $15,000.00. Under ch. 38, sec. 16-1, Ill. Rev. Stat. 1963, subparagraphs (1), (2) and (3) define separate intents, each of which is sufficient to allege the offense of theft. The only material distinction between Counts V, VI and VII is the intent alleged. Conceivably the defendant could possess the intent and state of mind to be guilty under each count of the indictment and subparagraph of the statute. Conceivably he may be proven guilty of only

two of the counts, one, or none. However, he is only guilty or innocent of one crime, theft. This is true despite the alternative nature of the counts as pleaded. These are not separate crimes arising out of the same conduct. They are separate counts alleging the same crime in the alternative as defined by statute.

Jeopardy attaches at the time a jury is empaneled and sworn. People v. Friason, 22 Ill. 2d 563, 565, 177 N.E.2d 230, 231 (1961). Jeopardy attached here once, not twice. It attached to one offense, theft, as alleged in alternative Counts V, VI and VII. The constitutional provisions relied upon by the defendant (United States Constitution, Amendment V, and Illinois Constitution, art. II, sec. 10) and the cases cited by the defendant all relate to the protection from being tried more than once for the same offense. Even if the defendant had been convicted on one count of theft and acquitted on the others, the defense of double jeopardy would not be available. People v. Minor, 20 Ill. 2d 496, 499, 170 N.E.2d 555, 556 (1960). Under Counts V, VI and VII the defendant was tried only once for a single offense in a single prosecution. He received a single sentence and the jury's verdict of guilty under the counts as pleaded was not inconsistent.

The defendant contends that Counts V, VI and VII are insufficient to state an offense in that subparagraphs (1), (2) and (3), defining intent, relate only to subsection (d),

defining an offense where the property was "stolen by another." The defendant argues that reliance upon the language of subparagraphs (1), (2) and (3) requires the State to allege the offense as defined in subsection (d), and that having failed to do so Counts V, VI and VII fail to state an offense as defined by statute. It is apparent that subparagraphs (1), (2) and (3) refer to the intent required to be alleged under all subsections, (a) through (d). This is apparent from the Committee Comments, S.H.A., ch. 38, sec. 16-1, and the express holding of the First District Appellate Court in People v. Nunn, 63 Ill. App. 2d 465, 473-74 (212 N.E.2d 342, 346 (1965)), wherein the Court stated:

> "The scheme of the code's drafters is that the lettered subsections (a), (b), (c) and (d) describe the proscribed acts any one of which constitutes the crime of theft if performed with the mental states requisite for conviction; and that subsections (1), (2) and (3) describe such mental states or conduct from which they will be presumed. See Committee Comments to this section, S.H.A., ch. 38, . . . /sec./ 16-1."

The defendant argues that the proof under all counts of the indictment is insufficient to prove an intent to defraud. The defendant asserts that there was no proof of secrecy or concealment. However, a close examination of the facts recited earlier discloses that he affirmatively concealed the fact of settlement from his client after depositing the proceeds to his personal account. The defendant has never surrendered the proceeds to his client, and the fact that he now

asserts that he stands ready to do so is in no way probative of his intent at the time he committed the acts charged under these counts. Restitution, promised or performed, is not a defense to theft or forgery.

The defendant raises objection to two instructions, People's instruction 12 and People's instruction 23. People's instruction 12 defined "intent to defraud" as follows:

> "An intent to defraud means an intention to cause another to assume, create, transfer, alter or terminate any right, obligation or power with reference to any person or property."

The defendant argues that this was improper because the indictment did not define "intent to defraud." This language was in the words of the statute. The fact that it was not defined by the indictment is further reason for its definition by instruction. The objection to People's instruction 23 follows the same line of reasoning as the defendant's previous contention that the charges alleging theft were insufficient by combining subparagraphs (1), (2) and (3) with subsection (b) of ch. 38, sec. 16-1, Ill. Rev. Stat. 1963. The instruction set forth the pertinent portion of the above statute, including subparagraphs (1), (2) and (3) under subsection (b), as follows:

> "23. A person commits theft when he knowingly:
>
> (a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; and,

(1) Intends to deprive the owner permanently of the use or benefit of the property;

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit."

For the reasons set forth earlier, this instruction is a proper statement of the law under this statute.

In conclusion, the defendant argues that the court was arbitrary in denying probation and entering an excessive sentence of three to ten years. The granting or refusing of probation is a matter of discretion. People v. Hamby, 6 Ill. 2d 559, 129 N.E.2d 746 (1955). We will not recite or re-evaluate the facts of this case or the circumstances considered by the trial court in entering sentence. It is sufficient to note that this offense was one of a serious nature by a person vested with public confidence and trust. The trial court was fully informed by hearing the evidence of the substantive offense and extensive evidence in connection with the application for probation. This sentence is not disproportionate to the offense.

The judgment and sentence of the circuit court of Coles County is, therefore, affirmed.

Affirmed.

TRAPP, P.J. and SMITH, J., concur.

No. 66-14M

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965

Abstract

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. STANLEY FLETCHER, Defendant-Appellant	Appeal from the Circuit Court of Kankakee County, Illinois - Magistrate Division Honorable Peter F. Swier Magistrate Presiding.

ALLOY, J.

Defendant Stanley Fletcher was convicted, in the Magistrate division of the Kankakee County Circuit Court, of the offense of Resisting a Peace Officer in violation of Section 31-1 of Chapter 38, Illinois Revised Statutes. As a result of such conviction, defendant was sentenced to the Illinois State Farm at Vandalia, Illinois, for a period of six months. The case is before this Court without a report of trial proceedings and upon the record only.

On appeal in this Court, defendant contends that he was not adequately warned or advised of his right to counsel by the Magistrate, and that the Magistrate did not comply with the statute in such case (1965 Illinois Revised Statutes, Chapter 38, Sections 109-1; 113-3). He also contends that the complaint against him did not state an offense. Defendant was never represented by counsel until after he had been imprisoned. The only record made in the case was a docket sheet and minutes taken from the docket sheet by the Circuit Court.

Defendant was originally issued a ticket by an officer charging defendant with no valid Illinois registration of a truck. He was then also charged in a criminal complaint with committing the offense of Resisting a Peace Officer in that he knowingly resisted the performance of the arrest by the complainant who was a peace officer. The arrest was made on November 22, 1965, and on the same day, defendant made bail and was released from custody to appear on December 2, 1965. On December 2, 1965, he did appear in court, pleaded not guilty and waived jury trial, and the cause was continued till January 20, 1966, for trial. Defendant was released on the bond which he had previously given. On January 20, 1966, defendant appeared in court in his own proper person and without counsel. The traffic violation charged was stricken (nolle prosequi) and trial proceeded before the court on the remaining charge. He was found guilty of resisting a peace officer and was sentenced to serve a term of six months as indicated.

Under the Illinois Constitution (Constitution of Illinois, Article 2, Section 9) a defendant charged with a crime is entitled to be advised of the nature and cause of the accusation against him. The complaint must be sufficiently specific so as to enable defendant to adequately prepare for his defense and to plead the judgment in bar of a subsequent prosecution for the same offense (PEOPLE v. KESSLER, 48 Ill. App. 2d 177). The complaint in the instant case in asserting that on the 22nd day of November, 1965, the defendant did then and there knowingly resist the performance of the arrest of said defendant by the complainant who was then and there a peace officer of the State of Illinois, meets the requirement and sufficiently charged an offense.

It is asserted on appeal in this Court that defendant was not advised of his right to counsel nor was there any inquiry made to determine if defendant

was indigent. Since no record of the proceedings was made so that a transcript could be made available on review, we are unable to determine exactly what transpired in the proceeding before the Magistrate. It appears, however, that defendant was not advised of his right to counsel. While no transcript would be required in the type of case we have before us but only in felony cases under Supreme Court Rule 26 (1965 Illinois Revised Statutes, Chapter 110, Section 101-26), there was an obligation on the part of the Magistrate to advise defendant of his right to counsel. We feel that the interests of justice in this case require that this cause be reversed and remanded to the Magistrate Division of the Circuit Court of Kankakee County for new trial.

The judgment of the Circuit Court of Kankakee County will, therefore, be reversed and this cause is remanded to said Court for new trial.

Reversed and Remanded.

Coryn, P. J. and Stouder, J. concur.

No. 65-80

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MERLE BLANKENSHIP, Plaintiff-Appellee, -vs- ARTHUR TRETTER, Defendant-Appellant.	)	Appeal from the Circuit Court of Jackson County, Illinois Honorable Peyton H. Kunce, Judge Presiding.

George J. Moran, J.

This is an appeal from the judgment of the Circuit Court of Jackson County, Illinois, in an action brought to recover for damages to the steering clutches of a motor vehicle during its alleged wrongful conversion by the defendant. The defendant moved to dismiss the complaint both at the end of the plaintiff's case and at the close of all the evidence, arguing that no damages had been proven. The motion was denied. The court found for the plaintiff and awarded damages in the amount of $755.72.

The defendant argues that there was not sufficient proof of damages because neither a receipted bill was admitted nor competent testimony by a qualified individual introduced to show that the amount was the necessary, reasonable, and usual cost for the type of work performed.

The following testimony constituted the sole evidence concerning the amount of the damages:

Q. Now what was the bill on repairing this?

Mr. White: Objection, your honor, as to what the bill was.

Court: He may answer.

Q. How much did you pay for this repair?

Mr. White: I object to that question.

Court: Objection overruled, he may answer.

A. $755.72, I believe is correct.

These objections were general objections and, as such, would be valid only to test the competency, relevancy, or materiality of the questions. Vol. 6, Callaghan's Illinois Evidence, Par. 16.06, pages 201 and 202. Since the testimony of the plaintiff had a legitimate, logical, and natural tendency to prove the payment and its reasonableness, it was relevant. Vol. 4, Callaghan's Illinois Evidence, Par. 5.03, page 8. If the defendant desired to object on the ground that there was no receipted bill or because there was no proof that the charges were reasonable and proper, he should have made a specific objection on one or both of these grounds. Since he failed to do so, he waived these objections. The "failure to make proper and timely objection to the admission of evidence..., giving specific reasons, for the objection...generally constitutes a waiver of the right to object." People v. Trefonas, 9 Ill. 2d 92, at 98; Baltimore and Ohio Southwestern Railroad Co. v. Brubaker, 217 Ill. 462; Tucker v. Duncan, 224 Ill 453.

In Balfour v. Dohrn Transfer Co., 328 Ill App 163, the court held that the testimony of the plaintiff concerning various amounts expended by him for repairs was sufficient to sustain an award of damages in the absence of a specific objection, saying at page 167:

> We do not deem it necessary to pass upon the admissibility of plaintiff's testimony to prove the remaining items of damage. Defendant made no objection to the testimony at the time it was given but was content to move to strike "this evidence as to damages" prior to cross-examination of plaintiff. A similar motion "to exclude all the evidence as to the truck and the repairs" was made at the close of all the evidence. Since there

was admissible evidence in the record proving some of the items of damage, defendant's motion was too broad. The trial court could not be expected to sort the evidence striking those items that were objectionable. Graham v. Dressen, 292 Ill. App. 15.

For the foregoing reasons, the judgment of the lower court is affirmed.

Judgment affirmed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY.